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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 312

DeBARDELEBEN COAL COMPANY, INC.,
Petitioner,

versus

MRS. LOLA MACOMBER, ADMINISTRATRIX OF THE ESTATE OF JOHN B. MACOMBER.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ALEX. W. SWORDS,
Attorney for Opponent.

R. A. DOWLING,
Of Counsel.

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The writ should not be granted because:

1. The judgment is based on a verdict of a jury on a purely fact question.

2. Two Courts of Louisiana, the District Court (Trial Court) and the Supreme Court of Louisiana, have decided this fact question in favor of opponent. The Supreme Court of Louisiana is the highest appellate court in the State.

3. That there is no conflict between the case at bar and any case decided by the Circuit Courts of Ap-

peal of the United States, but on the contrary this case is an affirmance of their decisions.

4. There was no error in either the Trial Court of Louisiana, or the Supreme Court of Louisiana, in deciding that the evidence offered was sufficient to have the case submitted to the jury on the question of negligence.

Verdict Based on Facts.

The record shows that the decedent lost his life as the result of an accident on the Steam Tug "CLARA", owned and operated by the defendant corporation. He was employed as a deck hand and while cleaning a smokestack fell overboard.

At the time of the accident the boat was in a canal near Bay Wallace, Louisiana. The boat was running against a head tide.

MACOMBER swam for about fifteen minutes trying to catch up with the boat, but finally sank from exhaustion.

The tide was running toward him and he had to swim against it.

During all that period no life ring was thrown to him, although there were at least four of them available. The crew, although knowing immediately of his danger, forgot their duty and never made the least attempt to rescue him.

The man working with him when he fell overboard could have thrown a life ring immediately, as one was

within his reach. He failed to do so, but ran forward shouting: "Man overboard."

The Captain and Pilot saw the decedent struggling in the water, but they too neglected the first rule of rescue and did not throw him a life ring, although four were at hand.

The Trial Court submitted to the jury on the general issue the question: "Was it negligence for the crew of the tug boat not to attempt the rescue of MACOMBER by casting over life rings?"

The jury determined it was negligence and gave a verdict for the plaintiff.

The Trial Judge believed that the crew were negligent and refused plaintiff a new trial.

The Supreme Court of Louisiana has affirmed this verdict, on the facts and the law under the procedure in Louisiana.

The failure of the crew to rescue MACOMBER caused his drowning.

The Failure to Even Attempt His Rescue by Throwing Him Life Rings Was the Failure of a Duty the Boat, Its Owners, and Its Agents Owed to Him.

"The duty to rescue a seaman overboard is a duty of the ship, and of the owners under the General Maritime Law of the Sea."

G. W. Glenn, 4 Fed. Supp. 727;
United States v. Knowles, 4 Sawy., 517 Fed. Case 15,540;
Harris v. Penn. R. R., 50 F. (2) 866.

* * * * * *

"This court has held that the act is to be liberally construed in aid of its beneficient purpose to give protection to the seaman and to those dependent upon his earnings."

Cortes v. Baltimore Insular Line, Inc., 287 U. S. 367, 53 S. Ct. 173, 77 L. Ed. 368;
Jamison v. Encarnacion, 281 U. S. 635, 50 S. Ct. 440;
Socony Vacuum Oil Company v. Smith, 305 U. S. 428, 59 S. Ct. 262, 83 L. Ed. 265.

* * * * * *

"A legal obligation rests upon a ship to use due diligence to save one of the crew, who, by his own neglect falls into the sea; and that the owners are liable if, by failure to perform this duty, his life is lost."

Harris v. Penn. R. R. Co., 50 F. (2) 866;
Salla v. Hellman, 7 F. (2) 953.

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"Where the findings are made on conflicting evidence, * * * the findings are entitled to great weight, and should not be upset, except for manifest error."

Lillig v. Union Sulphur Co., 87 F. (2) 277.

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"Facts found by the lower court and adopted by the highest court of a State, when supported by competent testimony, will not ordinarily be reexamined in the Federal Supreme Court on a writ of error to a State Court."

Portland R. L. & P. Co. v. R. R. Commission, 33 S. Ct., p. 821, 229 U. S. 397;

Kansas City So. v. Albers Com. Co., 223 U. S. 573, 32 Sup. Ct. 316;
Creswill v. Grand Lodge K. of P., 225 U. S. 246, 32 Sup. Ct. 822;
Great Northern Ry. Co. v. Knapp, 240 U. S. 464, 36 Sup. Ct. 399;
Pure Oil Co. v. State of Minnesota, 248 U. S. 158, 39 S. Ct. 36.

The Two Court Rule.

It is a familiar principle, repeatedly applied in the decisions of the Supreme Court, that findings of fact concurred in by two lower courts will be accepted by the Supreme Court of the United States unless clear error is shown.

This decision and the finding of facts has been concurred in by the District Court of Orleans Parish of Louisiana, and by the Supreme Court of Louisiana. The writ should be denied.

We cite:

United States v. Commercial Credit Company, 286 U. S. 63, 52 Sup. Ct. 467, 76 L. Ed. 978;

Radio Corporation of America v. Radio Engineering Laboratories, Inc., 293 U. S. 1, 55 Sup. Ct. 928, 79 L. Ed. 163;

Mechanics Universal Joint Company v. Culhane, 57 S. Ct. 81;

Pick Mfg. Co. v. General Motors Corporation, 55 Sup. Ct. 1;

Crowell v. Benson, 52 S. Ct. 285.

No Conflict With the Appellate Courts of the United States.

The case at bar is not in conflict with, but is an affirmance of the following cases on the same subject matter:

Harris v. Penn. R. R. Co.,
50 Fed. (2d) 866.

In this case which is an exact duplicate of the instant case the Court held (Fourth Circuit) that question of whether failure to rescue a member of the crew overboard is negligence is a question for the jury.

That case stands today as the leading case on the subject and has never been overruled.

We submit that the writ should be denied.

ALEX. W. SWORDS,
Attorney for Opponent.

R. A. DOWLING,
Of Counsel.